STATE OF MICHIGAN

COURT OF APPEALS

JAMES D. MOONEY,

Plaintiff/Counter-Defendant-Appellee,

v

MURIEL J. MOONEY,

Defendant/Counter-Plaintiff-Appellant.

UNPUBLISHED
November 13, 2003

No. 235187
Washtenaw Circuit Court
LC No. 00-000233-DM

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right the amounts of child and spousal support awarded under the parties' judgment of divorce. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Defendant contends that the amounts of child support and spousal support awarded by the trial court are erroneous, because the trial court erred in calculating the parties' respective incomes. Defendant asserts that the plaintiff's income was erroneously calculated because the trial court did not base its determination of plaintiff's income on an average of his previous four or five income tax returns. We disagree. This Court reviews a trial court's findings of fact for clear error. *Draggoo v Draggoo*, 223 Mich App 415, 429; 566 NW2d 642 (1997). A trial court's findings are clearly erroneous when, after conducting a thorough review of the record, this Court is convinced that the trial court made a mistake. *Draggoo*, *supra* at 429. If the court's factual findings are not clearly erroneous, this Court must determine whether the court's dispositional ruling was fair and equitable in light of those facts. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992).

The Michigan Child Support Formula Manual (West, 2001) (MCSF Manual) specifically indicates that "[n]et income should be determined from actual tax returns whenever possible." MCSF Manual, *supra*, § II(H), p 7. Averages of a party's yearly income are to be used only when a party's income fluctuates "considerabl[y]." MCSF Manual, *supra*, § II(A), p 3. Based on evidence of plaintiff's regular and overtime earnings and evidence that plaintiff's employer discontinued giving annual bonuses, the trial court properly valued plaintiff's income at $90,825 for purposes of determining child support.

Defendant next asserts that the trial court erred in imputing to her an income that was both unrealistic and inconsistent with her stated career goals. We agree. A minor child's parents have a statutory duty to support that child. MCL 722.3; *Macomb Co Dep't of Social Services v Westerman*, 250 Mich App 372, 377; 645 NW2d 710 (2002). Unless the result would be unjust or inappropriate given a particular situation, a trial court must follow the formula outlined in the MCSF Manual to determine each parent's respective contribution toward a child's support. *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003). The formula considers the needs of the child and the actual resources of each parent. MCL 552.519(3)(a)(vi); *Shinkle*, *supra* at 225.

The MCSF Manual expressly indicates that imputation may be appropriate "where there is voluntary unexercised ability to earn." MCSF Manual, *supra*, § II(I), p 8. Thus, a parent's "actual resources" may include that parent's unexercised ability to earn an income. *Shinkle*, *supra* at 225, citing *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998). Precisely because imputation of income based on a party's unexercised earning capacity is speculative, a court must evaluate a number of factors to determine the proper amount of income to impute. *Ghidotti*, *supra* at 198. These factors include the party's employment history, education and skills, available work opportunities, diligence in trying to find work, the party's personal history, assets, health and physical abilities, and availability for work. *Id*. A trial court's consideration of these factors advances the presumption that the court's imputation of income "is based on an actual ability and likelihood of earning the imputed income." *Ghidotti*, *supra* at 199. The MCSF Manual also instructs a court to make eight specific inquiries when determining whether and how much income to impute: (1) previous employment experience; (2) level of education; (3) physical and mental disabilities; (4) custodial relationship to the parties' children and its impact on the parties' earnings; (5) availability of employment in the area; (6) the prevailing wage rates in the area; (7) any special skills or training; or (8) any evidence supporting the party's ability to earn the imputed income. MCSF Manual, *supra*, § II(I), p 8.

We do not disagree with the trial court's observation that it may be possible for defendant to obtain recertification as a teacher in a short period of time. Nevertheless, the trial court failed to account for the fact that defendant was unemployed throughout the marriage with plaintiff's agreement and consent, that she had minimal work experience and no specific skills or training that are immediately marketable in the workforce, and that defendant's educational training was significantly dated and could impact her earnings as she returned to the workforce. In addition, as noted *infra* in more detail, the testimony upon which the trial court relied to establish a level of imputed income to defendant was speculative. We therefore remand for more detailed findings as required by the MCSF Manual, consistent with our disposition on the remaining issues.

First, we find that the trial court's order that income be immediately imputed to defendant was unfair and inequitable. As we noted earlier, defendant was unemployed throughout the marriage with plaintiff's agreement and consent. There was also no evidence that plaintiff had requested defendant to begin working prior to the time the divorce complaint was filed, and no evidence that any such opportunity was available.

Plaintiff testified at trial that he desired that defendant find employment after the divorce to support herself and assist in the support of the minor children. The record does not establish, however, that plaintiff objected to defendant remaining unemployed and continuing to home

school their eighth-grade daughter while the divorce action was pending. In fact, the entry of a consent order establishing child and spousal support that did not require defendant to seek or obtain employment belies any suggestion that plaintiff objected to defendant's unemployed status. On this record, we find that it was inequitable as a matter of law for the trial court to impute income to defendant from November 15, 2000 through August 2001.[1] Clearly, defendant did not voluntarily *reduce* her income as a result of the divorce proceedings as she had no income *to* reduce. See *Rohloff v Rohloff*, 161 Mich App 766, 744-775; 411 NW2d 484 (1987) (a trial court may order child support where a party voluntarily reduces income and the trial court concludes that the party has the ability to earn an income). Rather, defendant maintained the status quo during the divorce proceedings as agreed to by the parties.

We further find that the trial court's order that income of $26,600 per year be imputed to defendant commencing August 1, 2001 is unfair and inequitable. The trial court determined that defendant's plans to attend Ave Maria School of Law were vague, and therefore disregarded her employment preference. While we do not disturb this finding, nevertheless, the trial court's conclusion that defendant was able to obtain employment as a school teacher at a salary of $26,600 is not supported by the evidence. Defendant's sole employment experience consisted of only one year of classroom teaching many years prior to trial. Similarly, defendant's degree was acquired many years prior to trial, and defendant would need to complete ten credit hours of course work to obtain a current teacher's certification.

The testimony that "independent" schools would hire non certified teachers for positions and that jobs were available was conclusory and speculative, as there was no testimony that defendant specifically was qualified (with one year of teaching experience many years before) and eligible to be hired for a specific position, or to teach a specific subject or subjects, by education and training, that defendant could compete against prospective teachers with more recent work experience or education, or that there was no such competition for the teaching positions for which defendant would qualify. Moreover, there was no testimony whether, if required to pursue a teaching career, defendant's efforts to obtain recertification would be impeded if she were to be hired to teach full time at an "independent" school that did not require certification. On remand, the trial court must make more detailed findings to support any order imputing income to defendant commencing August 1, 2001. Defendant's efforts to obtain or prepare for employment subsequent to entry of judgment shall be relevant to any determination as to whether imputation of income is warranted.

Defendant next contends that the amounts of child and spousal support awarded were inadequate under the circumstances. We agree. Unless the trial court finds the result unjust or inappropriate, the amount of child support awarded must be calculated according to the guidelines set forth in the MCSF Manual; whether to award child support is not discretionary. MCL 552.16(2); MCL 722.717(3); *Burba v Burba (After Remand)*, 461 Mich 637, 643; 610 NW2d 873 (2000) (referring to MCL 552.17[2], which addresses modification of existing

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[1] As a result of the income imputed to defendant, the May 18, 2001 judgment of divorce orders a credit to plaintiff for child support and spousal support paid from November 15, 2000 until entry of the judgment, pursuant to a Consent Order entered by the trial court on October 27, 2000. This credit is also inequitable.

orders). This Court may reverse the trial court's decision only if, after reviewing all the evidence, the Court is firmly convinced that a mistake was made. *Kosch v Kosch*, 233 Mich App 346, 350; 592 NW2d 434 (1999).

The trial court has discretion whether to award spousal support in a divorce proceeding. *Demman v Demman*, 195 Mich App 109, 110; 489 NW2d 161 (1992); *Torakis v Torakis*, 194 Mich App 201, 204; 486 NW2d 107 (1992). The primary goal of spousal support is to distribute the incomes and needs of the parties in a manner that will not impoverish either party. *Magee v Magee*, 218 Mich App 158, 162; 553 NW2d 363 (1996). A trial court's spousal support order should not be modified absent this Court's firm conviction it would have reached a different result than did the trial court. *Torakis*, *supra* at 204. Factors relevant to the court's decision regarding spousal support include: (1) the length of the marriage; (2) the parties' ability to pay; (3) the past conduct or fault of the parties; (4) the age and health of the parties; (5) the parties' ability to work and their respective earning capacities; and (6) all other circumstances relevant to the court's disposition. *Sparks*, *supra* at 149-150.

Here, the trial court determined that spousal support was warranted and we agree. However, because the trial court clearly erred by imputing prejudgment income to defendant, and because the amount of income imputed post-judgment to the defendant by the trial court is not supported by the record, it is clear that the spousal support award of $7,000.00 annually to defendant is woefully inadequate. Moreover, the trial court clearly erred when it declared that "[t]his spousal support is specifically non-modifiable as to amount, term and duration." When a trial court renders an award of spousal support in a judgment of divorce, it retains continuing jurisdiction over the issue of spousal support subject to a petition by either party pursuant to a showing of changed circumstances. MCL 552.28; *Rickner v Frederick*, 459 Mich 371, 378-379; 590 NW2d 288 (1999). Any declaration that spousal support is non-modifiable with respect to amount or duration "no matter what change of circumstances occurs . . . in the future, constitutes an abuse of discretion." *McCallister v McCallister*, 101 Mich App 543, 551; 300 NW2d 629 (1980). On remand, the trial court may not so limit its award.

Additionally, the amount of child support awarded by the trial court in reliance on the parties erroneously calculated incomes is inequitable. On remand, after a new determination of the incomes of the parties, the trial court shall also determine the corresponding child support in a manner consistent with this opinion.

Defendant next argues that plaintiff was judicially estopped from relying on a Friend of the Court (FOC) referee report to obtain a consent interim order regarding support, and objecting to its admission into evidence during the trial. Defendant also contends the trial court erred by denying admission of the report. We disagree. A trial court may, but is not required to, consider the report and recommendations made by a FOC referee. *Duperon v Duperon*, 175 Mich App 77, 79; 437 NW2d 318 (1989), citing *Bowler v Bowler*, 351 Mich 398, 405; 88 NW2d 505 (1958). Unless stipulated to by the parties, the FOC report is not admissible evidence. *Truitt v Truitt*, 172 Mich App 38, 42; 431 NW2d 454 (1988); *Duperon*, *supra* at 79.

Defendant next contends the trial court abused its discretion by denying her motion for reconsideration and to reopen proofs and schedule an evidentiary hearing. In light of our disposition of defendant's claims on defendant's imputed income, child support, and spousal support, we need not address these claims.

Lastly, defendant asserts the trial court abused its discretion by failing to award her attorney fees. A party may request attorney fees where that party is unable to bear the expense of the action and the other party is able to pay. MCR 3.206(C)(2); *Hanaway v Hanaway*, 208 Mich App 278, 298; 527 NW2d 792 (1995). If the court's award of spousal support and property leaves the parties with comparable assets and incomes, an award of attorney fees is not appropriate. *Id*. at 299. The trial court made no findings on whether defendant was entitled to an award of attorney fees. Because the trial court will make new determinations on the income of the parties, child support, and spousal support on remand, we instruct that the trial court also determine whether defendant is entitled to attorney fees in light of these new findings.

Affirmed in part, reversed in part, and remanded for further findings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder